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No. 85-298

In The
Supreme Court of the United States
October Term, 1985

JOHN F. CONNOLLY,

Petitioner,

vs.

ANDREW K. BURT,

Respondent.

RESPONSE TO PETITIONER'S BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS

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March 5, 1986

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PRELIMINARY STATEMENT

Respondent, Dr. Andrew K. Burt, (hereinafter referred to as "Respondent") commenced the present litigation in October, 1981, when he was denied privileges in at least one Colorado hospital based on a letter written on October 21, 1980 by Dr. John F. Connolly, Chairman of the

Department of Orthopaedics at the University of Nebraska College of Medicine.

The Petitioner, Dr. Connolly, (hereinafter referred to as "Petitioner") never filed a responsive pleading after he was served with Dr. Burt's complaint. Although he did file motions to quash summonses and to dismiss, such motions were never treated as responsive pleadings. Justice John P. Moore, the presiding Judge in the above mentioned action, dismissed the case based on Dr. Connolly's Motion to Dismiss for lack of inpersonam jurisdiction pur suant to Fed. R. Civ. P. 12(b)(2). (J.A. 101; see Section IA *infra.*). This case was thereafter appealed and reversed in the Tenth Circuit and a Petition for Certiorari was granted by the Supreme Court of the United States.

In an attempt to be rational and conscienciously, Respondent looked carefully at the steps and resources needed to end this "thousand mile journey." Respondent discovered that even if he prevails in this Court, the case will be remanded to the District Court for trial. If he is successful at the District Court level, Petitioner will have the right to appeal such judgment. Respondent recognizes that he is far from the "last step of a thousand mile journey", but in actuality is still on the first leg. Even if Respondent is successful, he is looking at many more years of litigation and expenses. Rather than subjecting both himself and Petitioner to this, Respondent is willing to dismiss *with prejudice* any claim that he may have. Petitioner, with no apparent motive but vindictiveness, seeks to continue expending both his own and Respondent's resources.

ARGUMENT

I. THIS CASE HAS BECOME MOOT

This case is moot pursuant to the Federal Rules of Civil Procedure and the United States Constitution for the following reasons:

A. Burt Is Entitled To Unilateral Dismissal Of This Case Pursuant To Fed. R. Civ. P. 41(a)(1)

Petitioner first asserts that Respondent may not dismiss the action under Fed. R. Civ. P. 41(a)(1) because he filed a Motion to Dismiss for failure to state a claim, which pursuant to Rule 12(b), may be treated as a Motion for Summary Judgment. However, Rule 41(a)(1) requires the actual "service" of a Motion for Summary Judgment, not merely the Court's consideration of such a motion. Secondly, it appears that Petitioner's Motion for Failure to State a Claim was never even considered by the District Court. Obviously, Petitioner did not believe that it was important enough to the issues of this case to include a copy of it in this Court's record. *See, Joint Appendix.* A review of Respondent's Rebuttal Brief to Defendant's Oral Argument (J.A. pp. 94-100) and Judge Moore's Memorandum Opinion & Order (J.A. 101-104) shows that the issue of failure to state a claim was never considered. Since the Motion was not considered, it cannot therefore be treated as a Motion for Summary Judgment.

The purpose of the limitation in Rule 41(a)(1) is that when an Answer or Motion for Summary Judgment is

filed, it puts the factual questions at issue and gives defendant a right to have them decided. In this case, no factual questions are yet at issue.

B. In The Memorandum In Support Of Notice Of Dismissal Filed With The District Court For The District Of Colorado, Respondents Have Agreed To Dismiss With Prejudice Therefore Precluding Any Further Attempts To Refile Lawsuit.

Respondent has already stated in his Memorandum in Support of Notice of Dismissal, and reiterates in this brief, that he requests the District Court to dismiss the case at hand, *with prejudice*. (See attachment). This further strengthens Respondent's position that this case should be dismissed as moot since dismissing a case with prejudice is proof that he is not interested in, nor will be able to, pursue it further. Such dismissal will in no way prejudice the adversary party, but will save him considerable costs and attorney's fees.

C. The Issues In This Case Are Factual And Personal To Respondent, Therefore Respondents' Dismissal Renders Them Moot.

Respondent asserts that the issues in this case are unique. The assertions in the Complaint and Amended Complaint are that Petitioner made false statements with malicious intent. Certainly, Petitioner is not asserting that such action "almost inevitably will be repeated." The situation presented by this lawsuit therefore is one of personal vendetta and is not an issue that is likely to recur. In fact, professional ethics and alumni pride are two major

factors in preventing this behavior from becoming a recurring event.

While the issue of long arm jurisdiction may remain, the issue should be decided in the context of a case or controversy. It seems clear that pursuant to Art. III. § 2, of the United States Constitution, the jurisdiction of all federal courts is limited to "cases and controversies." *Aetna Life Ins. v. Haworth*, 300 U.S. 277 (1937). Since dismissal of the original action by Petitioner eliminates any real or substantial dispute affecting the legal rights and obligations of parties having adverse interest, the U.S. Supreme Court does not have jurisdiction to hear this action and it should be dismissed as moot.

Furthermore, an actual controversy must exist at all stages of review, not merely when the complaint is filed. Since there is no such controversy in existence here and since the issues in this care are not likely to recur, the Court should dismiss this cause as moot. *Doremus v. Board of Education*, 342 U.S. 429, 431 (1952); *See, Lake Coal Company, Inc. v. Roberts & Schaefer Co.*, 54 U.S.L.W. 4026 (U.S. No. 84-1240, Dec. 2, 1985).

II. RESPONDENT HAS NO OBJECTION TO THIS COURT VACATING THE TENTH CIRCUIT'S DECISION.

Respondent no longer has any interest in bringing this suit in Colorado nor does he have any intent to pursue it further on its merits. Therefore, if this Court feels it is best to vacate the Tenth Circuits' decision, Respondent has no objection.

III. THIS CASE SHOULD BE FOUND TO HAVE BECOME MOOT AND EACH SIDE SHOULD PAY THEIR OWN ATTORNEYS' FEES.

As noted in Petitioner's Response, Respondent attempted various negotiations with Petitioner at different stages of this lawsuit but none that were found to be satisfactory to all parties involved. The fact that Respondent was hoping to settle this case before it got this far is neither an unusual nor an unethical tactic. Therefore, Respondent should not now be prejudiced because he no longer has the finances nor the resources to continue this lawsuit.

Furthermore, Petitioners request that this Court award double costs or attorneys' fees to Petitioner is ludicrous. Such a request is based on the "unreasonable and vexatious" multiplication of the proceedings. However, Respondent, by dismissing this case is moot, will have managed to save both parties additional attorneys fees and court costs. It is only reasonable, under the circumstances, that both sides pay their own attorneys' fees and costs.

———o———

CONCLUSION

For the foregoing reasons, Respondent requests this Court to find that the action has become moot and dismiss this case in full. Furthermore, Respondent requests that

this Court rule that both sides shall bear its own attorneys' fees and costs.

Dated: March 5, 1986.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81 F 1850

—o—

MEMORANDUM IN SUPPORT OF NOTICE
OF DISMISSAL

—o—

ANDREW K. BURT,

Plaintiff,

v.

THE BOARD OF REGENTS at the university of Nebraska, et al.,

Defendant.

Plaintiff, Andrew K. Burt, by and through its attorneys, Stutz, Dyer, Miller & Delap, respectfully moves this Court, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, to dismiss the above styled action, with prejudice, and as grounds therefore shows unto the Court:

1. That the Defendants were served with a true and correct copy of the Summons & Complaint herein in the United States District Court, District of Colorado, on October 20, 1981.

2. That Defendants never filed or served a responsive pleading, and, under F.R.C.P. (41(a)(1), Plaintiff has an automatic right of dismissal until, and unless, such responsive pleading is filed or served by defendant.

3. That Defendants never counterclaimed or brought an independent action against Plaintiff, and therefore dismissal of the original action by Plaintiff renders the action moot.

4. That Defendants filed a Motion to Dismiss for lack of jurisdiction on December 14, 1981. The U.S. District Court granted the Motion on October 1, 1982.

5. That a Motion to Dismiss is not a responsive pleading preventing a voluntary dismissal under F.R.C.P. 41(a)(1).

6. That Plaintiff appealed the case on November 12, 1982, alleging that there were sufficient minimum contacts between Defendants and Colorado to warrant personal jurisdiction in Colorado. The United States Court of Appeals for the Tenth Circuit concluded that the District Court erred in its determination that it lacked personal jurisdiction over Dr. Connolly. The judgment was therefore reversed and remanded for further proceedings.

7. That Defendants thereafter filed a Petition For Certiorari in the United States Supreme Court on August 22, 1985. The said Petition for Certiorari was granted on December 2, 1985, Case No. 85-298.

8. That Plaintiff has exhausted all funds and resources in pursuit of this action and has therefore decided to forego any future action and dismiss the suit in its entirety.

9. That an action rendered moot, under existing precedent, will be cause for the United States Supreme Court to remand the case to the United States District Court for the District of Colorado with instructions to dismiss the cause as moot. See *Lake Coal Company, Inc. v. Roberts*

& Schaefer Co., 54 U.S.L.W. 4026 (U.S. Dec. 3, 1985), vacating as moot (6th Cir. 1985).

Dated: February 18, 1986.

Respectfully submitted,

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